Exercising Passive Personality Jurisdiction Over Combatants: A Theory in Need of a Political Solution

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Abstract

On March 4, 2005, a car carrying Nicola Calipari and Andrea Carpani, members of the Italian Ministry of Intelligence, and Giuliana Sgrena, a journalist who had been taken hostage one month before and who had just been released and was on her way back to Italy, was traveling to the Baghdad Airport. The car was fired on by U.S. forces from a checkpoint, killing Mr. Calipari and wounding Ms. Sgrena and Mr. Carpani.

As a result of this tragic event, a joint investigation occurred, but Italy and the United States could not agree on the results. The United States determined that the soldiers involved had acted appropriately. Italy disagreed, and on February 7, 2007, Mario Lozano, a U.S. Army National Guardsman, was indicted by Italian prosecutors who declared that Lozano could be tried in absentia because the case was "political."

The trial occurred, and the decision was announced on October 25th. Judge Gargani ruled that the law of the flag, or the law of the soldier's sending state, prevails over a claim of passive personality jurisdiction in a case like this. This paper analyzes Judge Gargani's decision and determines that he is correct. Absent another international agreement, the exercise of passive personality criminal jurisdiction over a combatant for combatant acts is inappropriate when the combatant's sovereign is seized of the case. Rather, because the combatant is acting on behalf of the sovereign, any claim against the combatant should be resolved through political means.

> In brief, between the criterion of passive authority and that of the flag there can be no doubt that the latter, also taking the contigent [sic] situation, which is provisional and

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> limited in time, prevails absolutely, not only because it is in harmony with the customary norm, but because it complies with the principle of reciprocity, the strongpoint of international law.[1]

On March 4, 2005, Nicola Calipari and Andrea Carpani, members of the Italian Ministry of Intelligence, were traveling to the Baghdad Airport. With them in the car was Giuliana Sgrena, a journalist on her way back to Italy who had been taken hostage one month before and had just been released. The court summarized the events of the day as follows:

> At 20.45 hours the car, while entering Route Irish, was struck by a beam of light and immediately afterwards by gunshots, coming from one side of the road, which fatally wounded Calipari. The latter was sitting on the back seat beside Ms. Sgrena, and having become aware of the danger he placed himself in front of her, shielding her with his body. Both Ms. Sgrena and Carpani were wounded.
>
> The gunfire came from US soldiers who had organised, acting on the orders of the high command, a checkpoint that was not planned on a permanent basis but had instead been set up that evening in order to secure the transit of the convoy in which US Ambassador Negroponte was to travel.[2]

As a result of this tragic event, on February 7, 2007, "Judge Sante Spinachi granted an indictment request made seven months [prior] by prosecutors"[3] against Mario Lozano, an Army National Guardsman in the rank of Specialist (SPC). The Italian prosecutors argued that the case was "political" because it involved several agents of the Italian state, meaning that "Lozano [could] be tried in absentia."[4]

As was made clear by the Italian court in its October 25 decision, the issue in this case was never one of who fired the shots that killed Mr. Calipari, and wounded Ms. Sgrena and Ms. Carpani; as the court stated:

> In point of fact, it has never been denied that the shots that hit the aforementioned victims were fired by the American soldier Mario Luis Lozano, the accused . . ., who is a member of the New York Arm [sic] National Guard, a US military corps that was part of the multinational force deployed in Iraqi territory.[5]

Rather, the issue was whether SPC Lozano was criminally responsible for the actions he took on that evening. This point was clearly stated by U.S. Congressman Vito Fossella:

> The friendly-fire death of Mr. Calipari is a tragedy, and we offer our condolences to his family and the Italian people, ... However, his death was not murder – and Spc. Lozano should not be tried in abstentia for a criminal act that he did not commit. Spc. Lozano was forced to take action because Calipari's vehicle failed to obey his repeated requests to stop. We are told that it sped through the warning line, the danger line and into the kill line. Lozano had no way of knowing who was in the car

1. Italy v. Lozano, Rome Court of Assize, 25 Oct. 2007, n. 5507/07 (E. A. Stace, trans.) (translation on file with author), 13.

2. *Id.* at 3.

3. *Judge Orders Indicts of U.S. Soldier in Calipari Case*, ANSA ENGLISH MEDIA SERV., Feb. 7, 2007, *available at* LEXIS, CURNWS File (News, Most Recent Two Years).

4. *Id.*

5. *Lozano, supra* note 1, at 3.

> and, therefore, he had every reason to believe it could be a car bomb racing to kill American soldiers and innocent Iraqis.[6]

After the incident, a joint Italian-U.S. commission investigated the incident but could not agree on the findings.[7] The United States "cleared its troops of any wrongdoing"[8] and asserted that "[t]he soldiers stuck to the rules of engagement for this sort of situation and therefore no action should be taken against them."[9] Despite this U.S. position, the case came to trial in Italy on September 27, 2007, where SPC Lozano's attorney, Alberto Biffani, argued that "members of the multinational forces operating in Iraq [were] under 'exclusive jurisdiction' of the country that sent them."[10] After arguments on jurisdiction, the trial was adjourned until October 25, 2007, when the judge "ruled that Italy had no jurisdiction in the case."[11]

As seen in the quote that began this article, Presiding Judge Gargani ruled that the law of the flag, meaning the law of a soldier's sending state, prevails over a claim of passive personality jurisdiction in a case like this. On June 19, 2008, the ruling was subsequently upheld on appeal at the Court of Cassation, Italy's highest court of appeal.[12] This paper will analyze Judge Gargani's decision and determine that his ruling is correct. Absent another international agreement, the exercise of passive personality criminal jurisdiction over a combatant for combatant acts is inappropriate when the combatant's sovereign is seized of the case. Rather, because the combatant is acting on behalf of the sovereign, any claim against the combatant should be resolved through political means.

This paper will initially look at Judge Gargani's ruling in greater detail, highlighting the reasoning for his decision. Section II will then review types of jurisdiction in general, with special emphasis on passive personality jurisdiction and its historical application, concluding that passive personality jurisdiction is a viable form of jurisdiction that is gaining popularity in modern international and domestic law. Section III will review the role of the military within the international system based on state sovereignty and how this relationship shapes the potential criminal liability of members of the military. Section IV analyzes whether Judge Gargani properly applied the principles of passive personality to the situation of a soldier in a combat environment and concludes that he did. The paper will conclude with some suggestions for resolving such jurisdictional conflicts in the future.

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6. *Rep. Fossella Steps Up Pressure on Italian Government to Block Trial In Absentia of US Service Member*, STATES NEWS SERV., Apr. 11, 2007, *available at* LEXIS, CURNWS File (News, Most Recent Two Years).

7. *Lozano, supra* note 1, at 4.

8. *Accused US Soldier Defends Self*, ANSA ENGLISH MEDIA SERV., June 20, 2007, *available at* LEXIS, CURNWS File (News, Most Recent Two Years).

9. *Id.*

10. Marta Falconi, *Trial of US Soldier Charged with Murder of Italian Agent in Iraq Resumes in Rome*, ASSOCIATED PRESS WORLDSTREAM, Sept. 27, 2007, *available at* LEXIS, CURNWS File (News, Most Recent Two Years).

11. *Court Throws Out Case Against US Soldier Charged Over 2005 Killing of Italian in Iraq*, ASSOCIATED PRESS WORLDSTREAM, Oct. 25, 2007, *available at* LEXIS, CURNWS File (News, Most Recent Two Years).

12. *Italian Court Quashes Case of US Soldier Who Killed Secret Agent*, AGENCE FRANCE PRESSE, June 19, 2008, *available at* LEXIS, CURNWS File (News Most Recent Two Years).

I. Judicial Decision

As noted above, the case before Judge Gargani involved a charge of murder of an Italian citizen in Iraq during an armed conflict by a uniformed combatant of another sovereign, the United States. These facts weighed heavily in Judge Gargani's decision. After detailing the facts of the case, Judge Gargani points out very clearly that "[t]his is the context in which the events in question here took place; a context qualifiable as armed conflict in a broad sense."[13] He further clarified his reasoning by stating, "[t]he doctrinal sources are all in agreement on ascribing a broad meaning to the concept of armed conflict."[14] Concluding that international law applied to this case because of its setting in an armed conflict, he quoted Article 10 of the Italian constitution, which states, "Italian laws conform to the generally recognized tenets of international law."[15] Judge Gargani then spent the rest of the decision determining what international law applied to the case and applying it to the facts.

As the initial issue in the case was jurisdiction—whether Italy had jurisdiction to try a foreign soldier for acts committed during an armed conflict—Judge Gargani examined the different types of jurisdiction recognized under international law, including passive personality jurisdiction, which the prosecutors were claiming applied in this case. After defining passive personality jurisdiction as "attribut[ing] such jurisdiction to the State to which the victim belongs,"[16] Gargani stated that "although it is not possible to identify any order of rank amongst the [various forms of jurisdiction], that of passive [personality] jurisdiction cannot be placed among the first-ranked."[17] After acknowledging that the use of passive personality jurisdiction had increased, particularly in the cases of terrorism and organized crime, Judge Gargani stated that, in the context of an armed conflict, there is an "exclusive basis"[18] for jurisdiction: —that of the flag state. Gargani wrote:

> There is in fact a customary norm of international law, meaning one that is applicable even if not foreseen in any treaty or agreement, based on the principle of so-called flag state jurisdiction. This is an uncontested legal principle which has been applied for centuries, according to which military contingents, when outside their own country whether under wartime or peacetime conditions, are answerable exclusively to their own laws and to the State to which they belong.. . . Independently of any provision established by treaty or convention, the right of the nation of origin to exercise its jurisdiction over troops of its own deployed in foreign territory has always been recognised. This establishes a regime of substantial and total jurisdictional immunity for foreign forces, comprised in the framework of the doctrine of *occupation belli*, above all in relation to the fact that the state organisation of an occupied country, in the great majority of cases, lacks any effective independence.

A strong principle indeed, whose justification lies in its specificity (its context is warfare or quasi-warfare) and which is in fact in contrast with, or rather supersedes and partially

13. *Lozano, supra* note 1, at 6.
14. *Id.*
15. *Id.* at 7.
16. *Id.* at 8.
17. *Id.*
18. *Id.* at 9.

annuls the principles foreseen on a general basis, that of territoriality and all the others, and which is also related to that of reciprocity, because in the case of several countries jointly participating in a war operation each of them holds jurisdiction over its own contingent.[19]

Next, Judge Gargani wrote about Status of Forces Agreements (SOFAs) and asserted that they are in "harmony with this customary law"[20] affording jurisdiction over combatants to the sending state. The decision then discussed the model U.N. SOFA, which states that military members involved in U.N. peacekeeping missions "shall be subject to the exclusive jurisdiction of their respective participating States."[21] Judge Gargani then reviewed various U.N. Security Council Resolutions that dealt with the status of forces in Iraq and pointed out that, in U.S. Secretary of State Colin Powell's letter that was attached to Security Council Resolution (UNSCR) 1546, "contributing states have responsibility for exercising jurisdiction over their personnel."[22] Judge Gargani added:

> This expression means that it is the participating States who assume the responsibility of taking penal action against the persons who have committed a crime, when the perpetrators are members of the respective contingents sent by nations in question. The latter assume responsibility, but not the obligation, to prosecute them, as is the case in Anglo-Saxon legal systems, in which the obligatory character of penal action is not foreseen.[23]

This reasoning led to his conclusion that flag-state jurisdiction prevails in time of war over the claim of passive personality jurisdiction.

For further support of his decision, Judge Gargani catalogued six recent military operations where the sending states were given exclusive jurisdiction over their military members[24] and reviewed Coalition Provisional Authority Order 17, which is still in effect, and states : "The Sending States of MNF Personnel shall have the right to exercise within Iraq any criminal and disciplinary jurisdiction conferred on them by the law of that Sending State over all persons subject to the military law of that Sending State."[25]

Finally, recognizing that the United States, though claiming to have cognizance of the situation, had not in fact taken any disciplinary action against SPC Lozano, Judge Gargani concluded that:

> [even if] the sender-nation does not exercise its exclusive jurisdiction, its non-exercise does not entail any possibility of a concurrent jurisdiction taking its place. . . The customary norms and UN resolutions we have examined, while giving jurisdiction to

19. *Id.* at 9-10.

20. *Id.* at 11.

21. The Secretary-General, *Report of the Secretary-General on the Model Status-of-Forces Agreement for Peace-Keeping Operations*, U.N. GAOR, 45th Sess., 594th mtg. at 12, U.N. Doc. A/45/594 (Oct. 9, 1990); Jaume Saura, *Lawful Peacekeeping: Applicability of International Humanitarian Law to United Nations Peacekeeping Operations*, 58 HASTINGS L.J. 479, 485-486 (Feb. 2007).

22. S.C. Res. 1546, U.N. Doc. S/RES/1546 (June 8, 2004), *available at* http://daccessdds.un.org/doc/UNDOC/GEN/N04/381/16/PDF/N0438116.pdf?OpenElement.

23. *Lozano*, *supra* note 1, at 13.

24. *Id.* at 15-16.

25. Coalition Provisional Authority Order Number 17, Status of the Coalition Provisional Authority, MNF-Iraq, Certain Missions and Personnel in Iraq, June 27, 2004, § 2(4), *available at* http://www.cpa-iraq.org/regulations/20040627_CPAORD_17_Status_of_Coalition__Rev__with_Annex_A.pdf.

> the sender State, do not and cannot oblige that State to conduct a formal trial, but only to make a decision in keeping with its own domestic legal system.[26]

For these reasons, Judge Gargani held that Italian courts do not have jurisdiction to try a U.S. soldier for alleged crimes committed against Italian nationals during an armed conflict in Iraq. Was Judge Gargani right? The paper will now turn to an analysis of Judge Gargani's reasoning and determine if it is in keeping with current international law.

II. Jurisdiction

Judge Gargani's ruling centered almost exclusively on the issue of jurisdiction under international law. As mentioned above, the Italian constitution incorporates international law, and, therefore, Judge Gargani applied the international rules of jurisdiction. The basis for these international rules of jurisdiction is the practice of states, and they "spring from customary international law, comity among nations, or domestic 'conflict of laws' principles."[27]

A. Types of Jurisdiction

Customary international law recognizes four bases of jurisdiction that provide exceptions to exclusive territorial jurisdiction: (1) the nationality principle, (2) the universality principle, (3) the protective principle, and (4) the passive personality principle.[28] These same principles are reflected in U.S. theory on jurisdiction. The Restatement (Third) of the Foreign Relations Law of the United States recognizes five forms of jurisdiction: 1) territorial jurisdiction, 2) nationality jurisdiction, 3) protective jurisdiction, 4) passive personality jurisdiction, and 5) universal jurisdiction.[29] Though there is a slight discrepancy between the description of these bases in Judge Gargani's opinion,[30] the important point

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26. *Lozano, supra* note 1, at 17, 19.

27. Geoffrey R. Watson, *The Passive Personality Principle*, 28 Tex. Int'l L.J. 1, 38 (1993).

28. Ian Brownlie, Principles of Public International Law 291-97 (2d ed. 1973).

29. Restatement (Third) of Foreign Relations Law of the United States § 402 (1987); Jennifer Dawn Taylor, *Ambiguities in the Foreign Corrupt Practices Act: Unnecessary Costs of Fighting Corruption?*, 61 La. L. Rev. 681, n.30 (2001) (listing ranking as:

> (1) territorial-jurisdiction over conduct where an element or the effect of the crime occurs within the state's territory; (2) nationality-jurisdiction based on the nationality of the perpetrator, no matter where the activity occurs; (3) protective-jurisdiction over conduct that 'threatens [a] state's sovereignty, security, or some important government function'; (4) passive personality-jurisdiction on the basis of the victim's nationality; (5) universal-jurisdiction over acts that are universally condemned "when no other state has a prior interest in asserting jurisdiction.").

30. *Lozano, supra* note 1, at 8 (where Judge Gargani writes:

> The first can be anchored to the principle of absolute universality or extraterritoriality, on the basis of which the law applies everywhere, by everyone and against whoever is the perpetrator of the act that is penally relevant for the national State.
> The second is that of territoriality, whereby the State in whose territory the criminal act occurred has the right to exercise its own jurisdiction
> The third attributes jurisdiction to the State to which the perpetrator of the act belongs (active jurisdiction).
> Lastly, the fourth attributes such jurisdiction to the State to which the victim belongs (passive jurisdiction).

for this paper is that all three recognize passive personality jurisdiction as a principle under international law.

Passive personality is not a new doctrine. In fact, it can be traced back to the Middle Ages.[31] Despite its history, it has traditionally not received wide acclaim or acceptance, particularly in comparison with the other principles of extraterritorial jurisdiction. By way of definition, "[t]he 'passive personality' principle of jurisdiction purports to confer jurisdiction on a state based on the nationality of the victim . . . . In effect, the passive personality principle allows the punishment of aliens whose acts abroad are harmful to the forum state's nationals."[32]

Until recently, passive personality jurisdiction has been highly disfavored by Western nations,[33] particularly by the United States.[34] This view is typified by the *Cutting* case involving the United States and Mexico.[35] A. K. Cutting was accused of criminal libel in Mexico against Emigdio Medina, a Mexican citizen. Upon charges being filed in Mexican court, Cutting agreed to publish a retraction. Cutting, however, republished his derogatory allegations in the *El Paso Herald*, a newspaper in Texas, and then circulated copies of the *Herald* in Mexico.

As a result, Mexican authorities revived the Mexican criminal proceedings and claimed that the act of publishing the *Herald* article was governed by Mexican law. The United States disagreed and sent word through its minister in Mexico City that Mexico had no right to assert jurisdiction over Cutting's actions in the United States, arguing that "Mexico's assertion of jurisdiction was 'wholly inadmissible,' and directing the Minister to demand Cutting's immediate release."[36] While other factors contributed to the U.S. response in *Cutting*, the case has come to stand for the U.S. rejection of passive personality jurisdiction.[37] This position would remain the U.S. position for almost one hundred years after the *Cutting* Case.

In contrast to the U.S. approach, the Permanent Court of International Justice ruled in the *S.S. Lotus* case that, because there was no "rule of international law" specifically limiting a state's claim of jurisdiction, Turkish courts were free to extend jurisdiction to the

31. Christopher L. Blakesley & Dan Stigall, *The Myopia of* U.S. v. Martinelli*: Extraterritorial Jurisdiction in the 21st Century*, 39 GEO. WASH. INT'L L. REV. 1, 25-26 (2007). *But see* Paul R. Dubinsky, *Human Rights Law Meets Private Law Harmonization: The Coming Conflict*, 30 YALE J. INT'L L. 211, 265 (2005) (where the author states, "[p]assive personality jurisdiction – jurisdiction based on injury to a state's citizens sustained while outside the state's territory – was practically unknown in international law until a few decades ago.").

32. Edmund S. McAlister, *The Hydraulic Pressure of Vengence:* United States v. Alvarez-Machain *and the Case for a Justifiable Abduction*, 43 DEPAUL L. REV. 449, 459-60 (1994).

33. Patrick L. Donnelly, *Extraterritorial Jurisdiction Over Acts of Terrorism Committed Abroad: Omnibus Diplomatic Security and Antiterrorism Act of 1986*, 72 CORNELL L. REV. 599, 602 (1987); McAlister, *supra* note 32, at 459-60. (where the author states: "[a]s a principle, it is the least justifiable of the jurisdictional bases, and scholars have historically been uncomfortable with its application. The source of the scholarly discomfort with the passive personality principle is its potential for producing preposterous results. If the victim's nationality were the sole criterion for exercising extraterritorial jurisdiction, the presumably every purse-snatching or bar fight that befell a state's national abroad would confer jurisdiction on the victim's state.").

34. Watson, *supra* note 27, at 4.

35. *See* U.S. DEPT. OF STATE, REPORT ON EXTRATERRITORIAL CRIME AND THE CUTTING CASE (1887); *Cf.* Watson, *supra* note 27, at 4-7 (quoting the Dept. of State Report and discussing the *Cutting* case); Blakesley & Stigall, *supra* note 31, at 26-27.

36. Watson, *supra* note 27, at 6.

37. *Id.* at 7.

perpetrators of crimes against Turkish nationals.[38] The specific holding of this case was later rejected in the 1958 Convention on the High Seas, [39] which withheld jurisdiction in a similar case to a ship's flag state or the nation of the perpetrator; but it was a move toward recognition of passive personality jurisdiction, which eventually gained much broader acceptance.

In the 1930s, a Harvard Research group found that there were at least twenty-five countries that recognized the principle of passive personality jurisdiction in their criminal codes.[40] The study concluded, however, that "passive personality without qualifications has been more strongly contested that any other type of competence."[41] Despite this conclusion, as will be discussed below, the move toward international acceptance of passive personality jurisdiction, at least with respect to certain actions, is steadily increasing.

B. Hierarchy of Jurisdiction

Judge Gargani's determination that "it is not possible to identify any order of rank" amongst the various theories of jurisdiction is not a universally held view. Passive personality jurisdiction has been variously described as "the most aggressive"[42] or "exotic"[43] form of jurisdiction and certainly the most controversial.[44] Arguing in one of the seminal treatises on the subject, Prof. Geoffrey Watson commented:

> [T]he international community would likely still favor the offender's home state [to exercise jurisdiction], presumably for the same reasons that extradition treaties permit states to deny extradition of their nationals regardless of the defendant's preferences. There is some sense, particularly among civil-law states, that a state should have the paramount right to decide when to deprive its own citizens of liberty, and that this right transcends even the right of states to enforce violations of law within their own territory.[45]

As demonstrated by the *Cutting* case mentioned above, both states and scholars have stated that, when a nation applies its jurisdiction extraterritorially, it must be based on a stronger claim than that of the citizen's state or the state where the crime occurred. If not, "the state must still show that the alleged offenses violate international norms and agreements in order to justify the violation of another state's territorial sovereignty"[46] and the application of passive personality jurisdiction. This led Prof. Watson to conclude in 1993 that

38. S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 13 (Sept. 7), *available at* http://www.worldcourts.Com/pcij/eng/decisions/1927.09.07_lotus/.

39. *See* Convention on the High Seas of 1958, Apr. 29, 1958, 13 U.S.T. 2312, 450 U.N.T.S. 11, *available at* http://untreaty.un.org/ilc/texts/instruments/english/conventions/8_1_1958_high_seas.pdf.

40. Edwin D. Dickinson, *Jurisdiction With Respect to Crime*, 29 Am. J. Int'l L. 435, 578 (Supp. 1935).

41. *Id.* at 579.

42. Eric Cafritz & Omer Tene, *Article 113-7 of the French Penal Code: The Passive Personality Principle*, 41 Colum. J. Transnat'l L. 585, 599 (2003).

43. Watson, *supra* note 27, at 2.

44. *Id.*

45. *Id.* at 21. Professor Watson further stated that "[p]assive personality jurisdiction does not clearly serve any interests furthered by territorial or nationality jurisdiction." *Id.* at 18.

46. Gregory S. McNeal & Brian J. Field, *Snatch-and-Grab Ops: Justifying Extraterritorial Abduction*, 16 Transnat'l L. & Contemp. Probs. 491, 500 (2007).

passive personality jurisdiction should be "treated as a residual form of jurisdiction, to be exercised only if no state claims territorial or nationality jurisdiction."[47]

Views on jurisdiction, however, have been changing since 1993, and Judge Gargani may have been anticipating an international trend, especially in specific cases. As one commentator states, the "least accepted theory of extraterritorial jurisdiction is the passive personality principle. . . . This form of jurisdiction has not been generally accepted for torts and crimes, but is becoming more accepted for acts of terrorism and other 'organized attacks on a state's nationals by reason of their nationality.'"[48]

In fact, many scholars now seem to agree that at least territoriality and nationality are more traditional and apply to a broader set of facts, but that passive personality has its place in international law as well.

> Territoriality and nationality clearly are accepted as the most traditional bases for a state to assert jurisdiction, but increasingly states have replaced these rigid concepts with "principles of reasonableness and fairness" reflecting "transformations in global communications, in the level and variety of transnational activity, and in perceptions of the way states interact with one another." The result has been an increase in the use of protective, passive personality and universality principles as a means of asserting jurisdiction over crimes previously difficult to punish.[49]

This idea of increasingly using passive personality to gain jurisdiction in difficult cases is supported by *United States v. Roberts*.[50] In this case, the court:

> upheld the use of the passive personality principle to charge an employee of a cruise ship with statutory rape after he allegedly engaged in a sexual act with an American minor while the ship was on the high seas. The court rejected the defendant's argument that the court lacked jurisdiction. In doing so, the court found that because the ship began and ended its voyage in the United States and most of its passengers, including the alleged victim, were American, the passive personality principle protected Americans abroad without intruding on the interests of another sovereign.[51]

The 1986 Restatement (Third) on Foreign Relations provides further evidence of a changing attitude, recognizing that the principle of passive personality jurisdiction was controversial but had gained some general acceptance in certain circumstances.[52] Those times when it has gained some acceptance may be limited, but they do exist and are occurring with increasing frequency.

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47. Watson, *supra* note 27, at 20.

48. Robert J. Lundin III, *International Justice: Who Should be Held Responsible for the Kidnapping of Thirteen Japanese Citizens?*, 13 TRANSNAT'L L. & CONTEMP. PROBS. 699, 707 (2003) (citations omitted).

49. Kenneth S. Freeman, *Punishing Attacks on United Nations Peacekeepers: A Case Study of Somalia*, 8 EMORY INT'L L. REV. 845, 859-60 (1994) (citations omitted).

50. United States v. Roberts, 1 F. Supp. 2d. 601 (E.D. La. 1998).

51. Aaron D. Buzawa, *Cruising with Terrorism: Jurisdictional Challenges to the Control of Terrorism in the Cruising Industry*, 32 TUL. MAR. L. J. 181, 185-86 (2007).

52. RESTATEMENT (THIRD) OF FOREIGN RELATIONS OF THE UNITED STATES § 402, comment g. (1986). *But see* Watson, *supra* note 27, at 9 (where the author states that as late as 1989, the United States "spoke against passive personality jurisdiction . . . in a case involving the murder of a United States National in Korea.").

C. Emerging Uses of Passive Personality Jurisdiction

The most accepted criminal application of passive personality is against terrorist activities.[53] The gradual acceptance of passive personality jurisdiction against terrorism has proceeded more slowly in the United States than in other parts of the world. For example, passive personality jurisdiction appears to be "on the ascendancy" in Europe.[54] The United Kingdom provides for passive personality jurisdiction over terrorists in the U.K. Terrorism Act 2000.[55] Prior to this, "English law ha [d] never before embraced this 'passive personality principle' of jurisdiction."[56] Other countries, including Germany, Israel, Italy, Mexico, Japan, Turkey, and France, have also incorporated passive personality jurisdiction into their domestic criminal statutes for offenses against their nationals while outside their territorial jurisdiction.[57]

U.S. acceptance of passive personality, even in this limited role against terrorism, began[58] with the acceptance of the International Convention Against the Taking of Hostages (Hostage Convention), [59] which allows for the exercise of passive personality jurisdiction. The Hostage Convention's provisions quickly began to have an effect. In *United States v. Yunis*,[60] the court used passive personality jurisdiction, and specifically relied on the Hostage Convention provisions, to accept jurisdiction over a Lebanese citizen and resident allegedly involved in a Jordanian civil aircraft with American citizens on board. The *Yunis* court also relied on the prior U.S. claim of passive personality jurisdiction when it sought extradition of Muhammed Abbas Zaiden for the Achillo Lauro incident and the death of Leon Klinghoffer.[61] These initial uses of passive personality jurisdiction in terrorism cases have created some momentum within the United States.

Since then, Congress has "adopted several anti-terrorism statutes founded at least partly on passive personality jurisdiction, though it prefers to call this legislation an exercise of protective jurisdiction."[62] Jurisdiction under the Hostage Taking Act fits under "the protective principle as well as the passive personality principle"[63] because it applies "when the

53. Ahmad E. Nassar, *The International Criminal Court and the Applicability of International Jurisdiction Under Islamic Law*, 4 Chi. J. Int'l L. 587, 589 (2003) (stating that "[t]he passive personality principle is not 'generally accepted for ordinary torts or crimes' but it is accepted for 'terrorist and other organized attacks' on nationals.").

54. Blakesley & Stigall, *supra* note 31, at 129-30.

55. Crime (International Cooperation) Act, (2003) c. 32, § 52 (U.K).

56. Michael Hirst, *Murder As An Offence Under English Law*, 68 JoCL 315 (2004).

57. Andrew J. Calica, *Self-Help is the Best Kind: The Efficient Breach Justification for Forcible Abduction of Terrorists*, 37 Cornell Int'l L.J. 389, 400 (2004).

58. Andreas Lowenfeld, *U.S. Law Enforcement Abroad: The Constitution and International Law*, 83 A.J.I.L. 880, 887 (1989) ("[h]ere, for the first time, the passive personality principle was contained in a treaty of general application to which the United States subscribed.").

59. International Convention Against the Taking of Hostages, Dec. 17, 1979, 18 I.L.M. 1456 (1979).

60. United States v. Yunis, 681 F. Supp 896, 901-03 (1988).

61. *Id.* at 902-03; *Sicilians Investigate U.S. for Egyptian Plane Intercept*, United Press Int'l, Oct. 27, 1985, *available at* LEXIS, CURNWS File; Matthew A. Slater, *Trumpeting Justice: The Implications of U.S. Law and Policy for the International Rendition of Terrorists from Failed or Uncooperative States*, 12 U. Miami Int'l & Comp. L. Rev. 151, 161 (2004); *see also* Watson, *supra* note 27, at 11 (stating that "[t]he prosecution of Yunis and the indictment of Abbas certainly suggest that the United States has begun to accept the passive personality principle, if only as applied to terrorist crimes.").

62. Watson, *supra* note 27, at 31.

63. *Id.* at 10.

offender or the victim is a U.S. citizen, "[64] but it is a clear acceptance of passive personality jurisdiction. This act was followed in 1986 with the enactment of the Omnibus Diplomatic Security and Anti-Terrorism Act, which made it a crime to murder an American citizen anywhere in the world.[65] Even then, Congress provided limits on the application of this jurisdictional theory. To counter the broad geographical reach of the law, "the Act's definition of international terrorism limits the principle's application to a specified class of crimes."[66]

The trend to accept passive personality jurisdiction continues to increase, though in closely circumscribed situations. In addition to acts of terrorism, "[i]n 1987 Congress expanded United States jurisdiction to include crimes against Americans 'outside the jurisdiction of any nation' – that is, on the high seas or in Antarctica."[67] The 1998 Intergovernmental Agreement on Space Station Cooperation provides for passive personality jurisdiction.[68] In *United States v. Benitez*,[69] the court seemed to apply passive personality jurisdiction to a drug case where a Colombian national assaulted, robbed, and conspired to murder a U.S. DEA agent.,[70] and, additionally, the United States uses passive personality to grant jurisdiction over "war crimes committed against U.S. *victims* pursuant to the War Crimes Act."[71]

Passive personality jurisdiction has also been put forth as a "rationale for U.S. jurisdiction over Saddam Hussein" because of "offenses that he committed against the United States and coalition forces."[72] At least one author argues for passive personality jurisdiction to apply to environmental standards,[73] and another as a potential means to protect cultural property.[74] Passive personality jurisdiction was proposed as the means of jurisdiction to enforce laws concerning internet gambling,[75] cyber crimes such as sending viruses

64. Yoav Gery, *The Torture Victim Protection Act: Raising Issues of Legitimacy*, 26 GEO. WASH. J. INT'L L. & ECON. 597, 619 (1993).

65. Jeanne M. Woods, *Presidential Legislating in the Post-Cold War Era: A Critique of the Barr Opinion on Extraterritorial Arrests*, 14 B.U. INT'L L.J. 1 (1996).

66. Patrick L. Donnelly, *Extraterritorial Jurisdiction Over Acts of Terrorism Committed Abroad: Omnibus Diplomatic Security and Antiterrorism Act of 1986*, 72 CORNELL L. REV. 599, 612 n. 234 (1987).

67. Watson, *supra* note 27, at 13 (quoting 18 U.S.C. § 7(7) (1988)).

68. Agreement Among the Government of Canada, Governments of the Member States of the European Space Agency, the Government of Japan, the Government of the Russian Federation, and the Government of the United States of America Concerning Cooperation on the Civil International Space Station, Article 22, *available at* ftp://ftp.hq.nasa.gov/pub/pao/reports/1998/IGA.html; Stacy J. Ratner, *Establishing the Extraterrestrial: Criminal Jurisdiction and the International Space Station*, 22 B.C. INT'L & COMP. L. REV. 323, 336 (1999).

69. United States v. Benitez, 741 F.2d 1312 (11th Cir. 1984).

70. Bruce T. Smith, *Assertion of Adjudicatory Jurisdication by United States Courts Over International Terrorism Cases*, 1991 ARMY L. 13, 20 (1991).

71. James Paul Benoit, *The Evolution of Universal Jurisdiction over War Crimes*, 53 NAVAL L. REV. 259, 313 (2006).

72. *See* Kenneth C. Randall, *Book Review: Universal Jurisdiction: International and Municipal Legal Perspectives by Luc Reydams* , 98 A.J.I.L. 627, 629 (2004).

73. Browne C. Lewis, *It's a Small World After All: Making the Case for Extraterritorial Application of the National Environmental Policy Act*, 25 CARDOZO L. REV. 2143, 2178-79 (2004).

74. Yaron Gottlieb, *Criminalizing Destruction of Cultural Property: A Proposal for Defining New Crimes under the Rome Statute of the ICC*, 23 PENN ST. INT'L L. REV. 857, 878-79 (2005).

75. Michael P. Scharf & Melanie K. Corrin, *On Dangerous Ground: Passive Personality and the Prohibition of Internet Gambling*, 8 NEW ENG. INT'L & COMP. L. ANN. 19 (2002). As of the writing of this article, this bill has not become law.

over the internet,[76] and the sexual exploitation of children.[77] It has even been proposed in the case of nuclear proliferators.[78]

The international world, however, has moved faster than the United States in this area. Passive personality jurisdiction was initially suggested for the Convention on the Prevention and Punishment of the Crime of Genocide.[79] It has been used by Italy,[80] France,[81] the Netherlands,[82] Romania,[83] Spain,[84] Belgium,[85] and the International Criminal Court.[86] Article 5(1) of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[87] requires state parties to establish jurisdiction for torturers through various methods, including passive personality juris-

76. John Eisinger, *Script Kiddies Beware: The Long Arm of U.S. Jurisdiction to Prescibe*, 59 WASH & LEE L. REV. 1507, 1532-33 (2002) (also acknowledging that any such cyber attack would likely provide for other, more well accepted means of jurisdiction.)

77. Blakesley & Stigall, *supra* note 31, at 156-57.

78. Adam Treiger, *Plugging the Russian Brain Drain: Criminalizing Nuclear-Expertise Proliferation*, 82 GEO. L.J. 237, 253 (1993).

79. Convention on the Prevention and Punishment of the Crime of Genocide, Jan. 12, 1951, 102 Stat. 3045, 78 U.N.T.S. 277; *see* Lee A. Steven, *Genocide and the Duty to Extradite or Prosecute: Why the United States is in Breach of Its International Obligations*, 39 VA. J. INT'L L. 425,457 (1999) (where the author states:

> [t]he Swedish representative proposed an amendment to the [Genocide Convention] . . . that would have recognized the passive personality principle of jurisdiction; his proposed amendment read: 'Furthermore, article VI should not be interpreted as depriving a State of jurisdiction in the case of crimes committed against its nationals outside national territory.' This proposal enjoyed support from Syria and qualified support from Egypt, but the United States adamantly oppose it, arguing that the Sixth Committee did not have the obligation to 'reconcile conflicts of law or to codify international law in the matter.').

80. *See* Marco Roscini, *Great Expectations: The Implementation of the Rome Statute in Italy*, 5 J. INT'L CRIM. JUST. 493 (2007) (stating: " Article 10(1) of the Penal Code provides for Italian jurisdiction over non-political crimes committed abroad by foreigners against the Italian state or nationals if the crime is one for which the penalty is no less than one year. The perpetrator must be present on Italian territory and the prosecution must be requested by the Minister of Justice or by the victim.").

81. *See* Lekha Sriram Chandra, *Revolutions in Accountability: New Approaches to Past Abuses*, 19 AM. U. INT'L L. REV. 301, 337 (2003); Cafritz & Tene, *supra* note 42, 587 (2003).

82. Chandra, *supra* note 79, at 362.

83. Moira McConnell, *"Forward This Cargo to Taiwan": Canadian Extradition Law and Practice Relating to Crime on the High Seas*, 8 CRIM. L.F. 335, 335 (1997).

84. Jamison G. White, *Nowhere to Run, Nowhere to Hide: Augusto Pinochet, Universal Jurisdiction, the ICC, and a Wake-Up Call for Former Heads of State*, 50 CASE. W. RES. 127, 144 (1999); James Paul Benoit, *The Evolution of Universal Jurisdiction over War Crimes*, 53 NAVAL L. REV. 259, 278 (2006); Antonio F. Perez, *The Perils of Pinochet: Problems for Transnational Justice and a Supranational Governance Solution*, 28 DENV. J. INT'L L. & POL'Y 175, 190-91 (2000); Robert C. Power, *Pinochet and the Uncertain Globalization of Criminal Law*, 39 GEO. WASH. INT'L L. REV. 89, 117 (2007). .

85. Damien Vandermeersch, *Prosecuting International Crimes in Belgium*, 3 J. INT'L CRIM. JUST. 400 (2005).

86. Christian Tomuschat, *The Legacy of Nuremberg*, 4 J. INT'L CRIM. JUST. 830 (2006). *But see* Remigius Oraeki Chibueze, *The International Criminal Court: Bottlenecks to Individual Criminal Liability in the Rome Statute*, 12 ANN. SURV. INT'L & COMP. L. 185, 204-08 (2006); Ariel Zemach, *Fairness and Moral Judgments in International Criminal Law: The Settlement Provision in the Rome Statute*, 41 COLUM. J. TRANSNAT'L L. 895, 900-02 (2003); Kenneth S. Gallant, *Jurisdiction to Adjudicate and Jurisdiction to Prescribe in International Criminal Courts*, 48 VILL. L. REV. 763, 822 (2003). *But see* Alejandro E. Alvarez, *The Implementation of the ICC Statute in Argentina*, 5 J. INT'L CRIM. JUST. 480 (2007) (where the author chronicles Argentina's refusal to extend jurisdiction to allow passive personality when enacting the ICC into domestic law).

87. G.A. Res. 39/46, 39 U.N. GAOR, Supp. No. 51, U.N. Doc, . A/39/51, at 197 (Dec. 10, 1984).

diction.[88] The 2003 U.N. Convention Against Corruption[89] "establishes a rather extensive jurisdictional basis, and in addition to previous treaties it specifically includes passive personality jurisdiction."[90] The U.N. Convention Against Transnational Organized Crime also allows for the use of passive personality in establishing jurisdiction.[91]

It seems clear that, particularly within the last several decades, the use of passive personality jurisdiction is increasing. This is certainly true for the crime of terrorism, and it is gaining greater acceptance for other crimes where it may be difficult to establish jurisdiction otherwise. Even among those who support passive personality jurisdiction, however, there are calls for caution to insure that the use of passive personality jurisdiction does not derogate individual human rights.

D. Passive Personality and Human Rights

As noted above, U.S. concern over the application of passive personality jurisdiction rests at least in part with its potential effects on individual human rights. For example:

> [m]ore than one hundred years ago, the United States Department of State expressed opposition to passive personality jurisdiction on the grounds that it would be unfair to criminal defendants. It would subject individuals "not merely to a dual, but to an indefinite responsibility"—a responsibility to obey foreign laws as well as United States laws.[92]

This concern continues today in an era of enhanced concern with individual human rights. The *Yunis* court explicitly recognized the potential unfairness of prosecuting a foreign national for violation of laws of a country of which he was not a citizen. The court determined, however, that, because the charge was one of terrorism and hostage taking, it involved "serious and universally condemned crimes [that did] not raise the specter of unlimited and unexpected criminal liability."[93]

Commentators have also recognized this issue and noted that a passive personality regime makes individuals subject to the laws of states with which they may have no familiarity and should not be expected to know. Professor Watson argued that it is "more fair to the defendant to give preference to the defendant's home state, for the defendant can be presumed to be aware of his own country's law—or at least can be presumed to be more familiar with his own country's law than with the law of his victim's state."[94]

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88. Javaid Rehman, *The Influence of International Human Rights Law Upon Criminal Justice Systems*, 60 JoCL 510 (2002).

89. United Nations Convention Against Corruption, *available at* http://www.unodc.org/pdf/corruption/publications_unodc_convention-e.pdf.

90. Ilias Bantekas, *Corruption as an International Crime and Crime Against Humanity*, 4 J. Int'l Crim. Just. 466 (2006).

91. G.A. Res. 55/25, art. 15, U.N. GAOR, 55th Sess., Supp. No. 49, Vol. 1, at 43, U.N. Doc. A/55/49 (2001); Roger S. Clark, *The United Nations Convention Against Transnational Organized Crime*, 50 Wayne L. Rev. 161, 179-80 (2004).

92. Watson, *supra* note 27, at 22 (quoting U.S. Dept. of State, Report on Extraterritorial Crime and the Cutting Case, *supra* note 33, at 840).

93. *Yunis*, *supra* note 60, at 902.

94. Watson, *supra* note 27, at 20. Professor Watson further argues:

A potential solution to this problem is to require mutual criminality, meaning that an individual may only be tried under passive personality jurisdiction for crimes that are also crimes within his or her own state of nationality.[95] Alternatively, if the use of passive personality jurisdiction is limited to "especially grave crimes[,] . . . the offenders should be aware of the illegality of their actions."[96] While this may be a solution, it has not yet manifested itself in domestic or international law.

A further argument regarding the rights of defendants would arise in a case like *Lozano*, where the accused is being tried *in absentia*. The exercise of passive personality jurisdiction, particularly when exercised in absentia, presents serious "[e]vidence- and testimony-gathering problems."[97] These problems present significant human rights issues, particularly when coupled with the lack of mutual criminality. Human rights advocates have long deemed *in absentia* trials to be per se violations of human rights.[98] While Judge Gargani did not deal specifically with this issue, it is not unreasonable to assume that such considerations informed his opinion.

Regardless of whether the international system eventually requires mutual criminality and/or only exercises passive personality jurisdiction in the case of serious crimes, Judge Gargani rightly concluded that passive personality jurisdiction is an increasingly accepted form of jurisdiction that is gaining in popularity in modern international and domestic law. The next questions to be addressed are the role of the military within the international system based on state sovereignty and how this relationship shapes potential criminal liability of military members.

III. Sovereignty and the Military

For in the less solemn kinds of war, what the members do, who act under the particular direction and authority of their nation, is by the law of nations no personal crime in them:

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passive personality jurisdiction can be fair to the defendant, but only if applied to defendants who have reason to know their conduct constitutes a serious crime in the victim's state. For this reason, passive personality jurisdiction should be limited to serious crimes punishable by significant jail terms in both the victim's and the defendant's states. Such a rule would put the defendant on notice, minimize the possibility of disproportionate punishment, and ensure that serious offenders do not evade prosecution altogether.

Id. at 27.

95. *Id.* at 16 (where the author argues "[l]ike nationality jurisdiction, passive personality jurisdiction will usually be viewed as intrusive when dual criminality is lacking"). The author further argues that "it seems unlikely that the international legal system will ever approve of passive personality jurisdiction unless there is at least some element of 'dual criminality' built into it." *Id.*

96. Ariel Zemach, *The Limits of International Criminal Law: House Demolitions in an Occupied Territory*, 20 CONN. J. INT'L L. 65, 83 (2004).

97. Anthony J. Colangelo, *The New Universal Jurisdiction: In Absentia Signaling Over Clearly Defined Crimes*, 36 GEO. J. INT'L L. 537, 576 (2005).

98. *See* AMNESTY INTERNATIONAL USA, FAIR TRIALS MANUAL 21.1, http://www.amnestyusa.org/international-justice/the-right-to-a-fair-trial/fair-trials-manual/page.do?id=1104744&n1=3&n2=35&n3=835 (follow "21. The right to be present at trial and appeal" hyperlink) (where Amnesty International states that every accused has the right to be present at trial and states: "The organization believes that the sole exceptions to this should be if the accused has deliberately absented themselves from the proceedings AFTER they have begun or has been so disruptive that they have had to be removed temporarily.").

they cannot therefore be punished consistently with this law for any act, in which it considers them only as the instruments, and the nation as the agent.[99]

This quote is extraordinary, especially because it comes from seventeenth century England. It reflects a fundamental change that occurred as the nation state became the fundamental unit of the international system and began to monopolize violence through standing armies as a means of establishing legitimacy in both the domestic and international sphere. As a result of that consolidation of military power, those armies became the sovereign's agents; and the sovereign was the only one who could regulate the military, determine their privileges and immunities, and determine their criminal liability when acting in obedience to the sovereign's commands.

A. Establishment of Standing Armies as the Sovereign's Agent

In the centuries after the fall of Rome and the break-up of its empire and before the formal establishment of the nation state system in the seventeenth century, the medieval system of raising and disbanding armies prevailed. There were no standing armies, merely armies at the disposal of the local prince as long as he had enough money to hire them.[100] Prior to the rise of national standing armies, mercenaries were "the dominant armed instrument of the State because they were an economic alternative to more expensive standing armies."[101] These armies, however, often turned on those who hired them, once the battle was over, and there was no longer a need to pay the gathered forces.[102]

Since the beginning of time, communities have excused otherwise punishable behavior as long as it was done on behalf of society. For example, murder and theft were punishable by the community, but raiding the neighboring village to carry off its goods or people was acceptable because it benefited the community. With the rise of the nation state and the enlarging of the sense of community, to legitimize itself the state had to gain control of the violence it needed for security. The sovereign achieved this goal by creating a standing army that functioned at the will of the sovereign. With the establishment of the nation state and the empowering of a single sovereign, that sovereign became the voice of the people and the controller of violence, both domestically and internationally. The King not only prevented violence within his realm, but also directed his standing armies to commit violence outside his realm to further his objectives. It was the sovereign and the sovereign alone who regulated his armed forces.[103] In so empowering the army, the sovereign also had to be willing to legitimize the acts of the army in the face of the King's justice, so long as the army followed the King's command.

B. Sovereign Regulation of National Armies

As states became associated with territory, as opposed to a particular sovereign, conscription became more and more effective as a measure of maintaining the standing army.

99. Michael D. Ramsey, The Constitution's Text in Foreign Affairs 225 (2007) (quoting *1 Matthew Hale, History of the Pleas of the Crown 162-63 (1672)*.

100. Philip Bobbitt, The Shield of Achilles 81-82 (Alfred A. Knopf ed. 2002).

101. *Id.* at 331.

102. *Id.* at 82.

103. *Id.* at 82.

In 1620, Sweden's Gustavus Adolphus instituted conscription, as opposed to hiring a mercenary army, because it was cheaper, invoked patriotism in order to encourage sacrifice on the battlefield, and "relied on a relationship between subject and monarch so that the duties it imposed were matters of obedience to orders and not interpretations of a contract."[104]

This tie to the sovereign soon developed into a very important part of the armed forces. No sovereign demonstrated this development more effectively than Napoleon. In a time where 50,000 -man armies were considered very large, Napoleon had almost 700,000 soldiers in the field at his disposal in 1808. Between 1800 and 1815, he mobilized over two million Frenchmen as part of his Grand Armee.[105] And most strikingly, his army was an army of "Frenchmen" as opposed to a group of vassals who were doing their required duty to avoid death or punishment or a band of mercenaries who were only attracted so long as the work was profitable.[106] The armies took their directions from the sovereign, acted as his agent, followed his instructions, and were consequently granted the sovereign's license.

A concurrent development with sovereign control of national standing armies was the formalization and further expansion of the laws of war. Limitations on the use of force have existed since organized combat,[107] and were fairly widespread in almost all developed civilizations throughout history.[108] After the Battle of Solferino and the onset of the U.S. Civil War (with its 1863 Lieber Code), however ,[109] a string of international meetings and agreements between sovereigns began, which applied stricter rules to the conduct of warfare and the protection of those not directly involved in the fighting. These meetings and agreements include: the 1864 Convention for the Amelioration of the Condition of the Wounded in Armies in the Field (the 1864 Convention),[110] with its accompanying Additional Articles of 1868; the 1868 Declaration of St. Petersburg;[111] the Hague Conventions of 1899 and 1907;[112] the 1906 Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field; [113] and the 1909 Naval Conference of London.[114]

While the content of these agreements and meetings was certainly significant for the members of each nation's military, more important for this paper are the mere facts that the meetings occurred and that the respective sovereigns were the drivers behind the

104. *Id.* at 114.

105. *Id.* at 162.

106. *Id.* at 175-76.

107. *See* William Bradford, *Barbarians at the Gates: A Post-September 11th Proposal to Rationalize the Laws of War*, 73 MISS. L. J. 639, n.12 (2004); Chris Jochnick & Roger Normand, *The Legitimation of Violence: A Critical History of the Laws of War*, 35 HARV. INT'L L.J. 49, n.37 (1994); Gregory P. Noone, *The History and Evolution of the Law of War Prior to World War II*, 47 NAVAL. L. REV. 176, 182-85 (2000).

108. Eric Talbot Jensen, *The ICJ's "Uganda Wall": A Barrier to the Principle of Distinction and an Entry Point for Lawfare*, 35 DEN. J. INT'L L. & POL'Y 241, 245-46 (2007).

109. DIETRICH SCHINDLER & JIRI TOMAN, THE LAWS OF ARMED CONFLICTS 3 (3rd ed. 1988).

110. *Id.*at 279.

111. *Id.* at 101,

112. *Id.* at 63-103.

113. *See id.* at 301.

114. *Id.* at 843.

meetings. It is important to note that when Henry Dunant,[115] a Swiss businessman without formal ties to any government or military, wanted to provide better care for the wounded and sick on the battlefield, he invited sovereigns to a meeting to discuss his proposals. He clearly recognized that if he wanted to influence the militaries, he would have to do it through the sovereigns , because it was the sovereigns who made the rules by which the militaries governed themselves. And, in fact, the 1864 Convention was the result of a meeting sponsored by the Swiss government and attended by Representatives from European governments as well as from the United States, Brazil, and Mexico.[116]

The role of the sovereign in the development of rules of warfare highlights the fact that the military is the agent of the sovereign and functions under the permissions and limitations that the sovereign places on it. Through these agreements, the sovereign described the actions that his military could lawfully take as his agent and clarified that the sovereign and only the sovereign could regulate and direct his armed forces.

This relationship between the sovereign and members of the military is even more clearly demonstrated by the Convention (III) Relative to the Treatment of Prisoners of War (GPW)[117] that was completed in Geneva immediately after World War II. In Article 4, the signatories defined who could be granted prisoner of war status, effectively determining who would qualify as lawful combatants in armed conflict between sovereigns.[118] Notably, Article 4 did not describe everyone who would be on the modern battlefield; ,[119] but it clearly delineated those on the battlefield who the sovereign invested as his agents.

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115. See International Committee of the Red Cross, http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/57JNVP for a concise history of Dunant, including the Battle of Solferino.

116. *See id.*

117. *See* Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, *reprinted in* SCHINDLER & TOMAN, *supra* note 109, at 430-31.

118. *See id.* (quoting Article 4). Article 4 reads:.

> A. Prisoners of War, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:
> (1) Members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces.
> (2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil [sic] the following conditions:
> (a) that of being commanded by a person responsible for his subordinates;
> (b) that of having a fixed distinctive sign recognizable at a distance;
> (c) that of carrying arms openly;
> (d) that of conducting their operations in accordance with the laws and customs of war.
> (3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.

Id.

119. For example, the Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of International Armed Conflict, June 10, 1977, 1125 U.N.T.S. 3, *available at* http://www.icrc.org/ihl.nsf/FULL/470?OpenDocument) outlaws the use of mercenaries. There is also an intense academic discussion on the role of contractors on the battlefield and what privileges and immunities they deserve. *See* Geoffrey S. Corn, *Unarmed but How Dangerous? Civilians Augmentees, the Law of Armed Conflict, and the Search for a More Effective Test for Defining Permissible Civilian Battlefield Functions* (2006), *available at* http://ssrn.com/abstract=895525; Private Security Contracting in Iraq and Afghanistan, 109th Congress (Oct. 2, 2007), *available at* http://www.state.gov/m/ds/rls/rm/93191.htm; Christopher J. Mandernach, *Warriors*

These agreements, combined with state practice, clearly illustrate that since the state has been the preeminent unit in international law, it is the sovereign who has exercised control over the military and provided regulation and direction for each nation's military. Because of this role for the sovereign , the military functions as the agent of the sovereign; therefore, it is the sovereign who determines when a soldier is punishable for acts conducted while on the sovereign's mission.

C. Criminal Liability of the Sovereign's Military

In Judge Gargani's opinion, he argued that the "law of the flag" trumps other forms of jurisdiction over armed forces during armed conflict.[120] This assertion grows naturally from the previous section's determination that, as the sovereign's agent, the military forces receive direction and regulation from the sovereign. Because the military functions at the behest of the sovereign, and within the direction and regulation the sovereign sets for it, it only makes sense that the sovereign also cloaks its armed forces with privileges and immunities resulting from that agency. It is from this reasoning that the well-established "law of the flag" originates.[121]

One of the most noted and also well-established privileges and immunities that the sovereign grants to his armed forces is combatant immunity—immunity from prosecution for otherwise criminal acts such as killing another—so long as they remain within their sovereign's regulation and direction. Indeed, the great benefit to falling within the previously mentioned Article 4 of GPW, is the grant of combatant immunity.[122] A state that has granted combatant immunity to its military members is responsible for ensuring that those military members conform to the law of armed conflict. If they do not, the State has the obligation to take appropriate action.[123]

Without Law: Embracing a Spectrum of Status for Military Actors, 7 Appalachian J. L. 137 (2007); Geoffrey S. Corn, *Contractors, the Privatization of War, and Accountability*, World Pol. Rev., Oct. 5, 2007, *available at* http://www.worldpoliticsreview.com/article.aspx?id=1214; *Developments in the Law – International Criminal Law v. Corporate Liability for Violations of International Human Rights Law*, 114 Harv. L. Rev. 2025 (2001); Jeffrey F. Addicott, *Contractors on the "Battlefield:" Providing Adequate Protection, Anti-Terrorism Training, and Personnel Recovery for Civilian Contractors Accompanying the Military in Combat and Contingency Operations*, 28 Hous. J. Int'l L. 323 (2006); J. Ricou Heaton, *Civilians at War: Reexamining the Status of Civilians Accompanying the Armed Forces*, 57 A.F. L. Rev.155 (2005); Virginia Newell & Benedict Sheehy, *Corporate Militaries and States: Actors, Interactions, and Reactions*, 41 Tex. Int'l L.J. 67 (2006).

120. *Lozano*, *supra* note 1, at 13.

121. Susan S. Gibson, *Lack of Extraterritorial Jurisdiction Over Civilians: A New Look at an Old Problem*, 148 Mil. L. Rev. 114 n.271 (1995); Manuel E. F. Supervielle, *The Legal Status of Foreign Military Personnel in the United States*, 1994 Army Law. 3, 6 (1994) (quoting John Woodliffe, The Peacetime Use of Foreign Military Installations Under Modern International Law 170 (1992)); Youngjin Jung & Jun-Shik Hwang, *Where Does Inequality Come From? An Analysis of the Korea-United States Status of Forces Agreement*, 18 Am. U. Int'l L. Rev. 1103, 1112-12 (2003); Roland J. Stanger, *Criminal Jurisdiction Over Visiting Armed Forces*, 52 U.S. Naval War C. Int'l Studies 8 (1965). *But see* Brian H. Brady, *The Agreement Relating to a United States Military Training Mission in Saudi Arabia: Extrapolated to Deployed Forces?*, 1995 Army Law. 14, 17 (Jan. 1995) (where the author states, "The United States no longer holds to the absolutist theory that the 'law of the flag' follows its troops" in peacetime operations).

122. *See* Eric Talbot Jensen, *Combatant Status: It Is Time for Intermediate Levels of Recognition for Partial Compliance*, 46 Va. J. Int'l L. 209, 223 (2005) (stating that "[t]his blanket immunity for warlike acts that fit within the law of armed conflict turns a murderer into a soldier doing his duty to his sovereign").

123. Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War arts. 146-47, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S 287, *reprinted in* Schindler & Toman, *supra* note 109, at 495.

With that obligation to take appropriate action comes the exclusive authority to remove that immunity. This principle is confirmed not only in state practice but also in applicable international agreements. For example, the Model United Nations Status of Forces Agreement for Peacekeeping Operations[124] states that if participating nation peacekeepers are suspected of having committed offenses, including war crimes, they "shall be subject to the exclusive jurisdiction of their respective participating States."[125] Judge Gargani chronicled a list of other precedents on this issue that could also be raised in support of this principle of international law.

It may be argued that the International Criminal Tribunals and the International Criminal Court have removed that exclusive status of the sovereign state. This paper, however, only deals with the exclusive right vis a vis other domestic sovereigns. Under the U.N. Charter,[126] the Security Council has the responsibility to maintain international peace and security,[127] and each member state has agreed.[128] Therefore, if the Security Council determines that it is necessary to establish an international criminal tribunal to further international peace and security, each domestic sovereign has agreed to comply. Further, member states of the International Criminal Court have done likewise.[129] In each of these cases, the sovereign has acceded to this exception to its complete sovereignty over its armed forces.

This section demonstrates that the armed forces of a nation are the agent of the sovereign, who directs and regulates those forces and has the obligation to ensure compliance with those directions and international law. Concordant with that obligation comes the authority to grant privileges and immunities, including combatant immunity to actions during armed conflict. This authority is exclusive.

IV. Military Immunity from Passive Personality Jurisdiction

Given the prior analysis, it is now possible to examine Judge Gargani's judgment in *Lozano*. At the outset, it is important to remember that this trial grew out of combatant acts that occurred during an armed conflict, and that the combatant's sovereign determined that there was no wrongdoing. Judge Gargani's ruling was that Italy could not exercise passive personality jurisdiction over a U.S. soldier who had killed an Italian national during an armed conflict where the United States had taken cognizance of the occurrence and, as the soldier's sovereign, taken the action it deemed appropriate.

A. Passive Personality versus Law of the Flag

Judge Gargani correctly analyzed the superiority of the law of the flag over a jurisdictional claim of passive personality. Indeed, Judge Gargani may have given the passive personality principle too much credit by refusing to allow for a hierarchy between com-

124. U.N. Doc. A/45/594 (Oct. 9, 1990).

125. *Id.* at art. 47; Jaume Saura, *Lawful Peacekeeping: Applicability of International Humanitarian Law to United Nations Peacekeeping Operations*, 58 Hastings L.J. 479, 485-486 (2007).

126. U.N. Charter, *available at* http://www.un.org/aboutun/charter.

127. *Id.* at art. 24, para. 1.

128. *Id.* at art. 25, para. 1.

129. Rome Statute of the International Criminal Court, art. 86, *available at* http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_English.pdf.

peting theories of jurisdiction. Currently, while acceptance of passive personality appears to be increasing throughout the world, its most common uses are limited to specific, universally abhorrent crimes such as terrorism and hostage -taking. Many other proposals for use of passive personality jurisdiction exist and are receiving attention in various countries, but few commentators have argued that passive personality jurisdiction would trump more traditional theories of territoriality and nationality when states with these claims step forward to take action.

In comparison, the law of the flag is still a very viable and supported theory in both state practice and international agreement. As Judge Gargani pointed out, in recent armed conflicts, nations have functioned under the implied and expressed view that jurisdiction over armed forces during an armed conflict rested exclusively with the sending state. The Model United Nations Status of Forces Agreement for Peacekeeping Operations further confirms this precept, as do other international agreements such as the U.N. Security Council Resolutions.

One possible exception to this rule would be if the flag state took no cognizance of the occurrence. Speaking of passive personality jurisdiction as opposed to territoriality or nationality jurisdiction, Professor Watson argued that "if neither the state in which the crime occurred nor the offender's home state prosecutes, they should not have reason to complain if the victim's home state then desires to prosecute."[130] Regardless of whether this might be true, it is not applicable here because the United States did take cognizance of the event and so informed Italy.

B. Sovereign Determination Conclusive

Not only did the United States take cognizance of the issue, but as Judge Gargani acknowledged, U.S. authorities conducted a combined investigation of the event with Italian authorities. Although the joint investigative team came to two different conclusions, it is clear from the facts that the United States was fully engaged in the circumstances and that, as the sovereign of the soldier in question, it took the action it deemed appropriate. This much is clear from Judge Gargani's statement that the U.S. Department of State communicated to the government of Italy that it deemed the case closed.[131]

These facts and actions were sufficient for Judge Gargani to deem that the United States, as the sovereign exercising law of the flag jurisdiction over Lozano, had determined there was no criminal liability. In fact, Judge Gargani made clear that the U.S. decision not to prosecute SPC Lozano "cannot give rise to the conclusion that, on the basis of that legal system, no jurisdiction had been exercised."[132]

As before, international law and state practice support Judge Gargani's decision. As the sovereign and grantor of privileges and immunities to its agents, the United States' determination concerning the actions of a military member in the course of an armed conflict are determinative and cannot be second-guessed by the victim's state. With the authority and obligation of the sovereign to ensure compliance by its armed forces, comes the exclusive power to determine criminal liability.

130. Watson, *supra* note 27, at 21.
131. *Lozano*, *supra* note 1, at 5.
132. *Id.* at 19.

V. Conclusion

Judge Gargani's decision that Italy could not exercise jurisdiction over SPC Lozano was correct. Absent another applicable international agreement, the exercise of passive personality criminal jurisdiction over a combatant for combatant acts is inappropriate when the combatant's sovereign is seized of the case.

Does this determination leave Italy with no recourse when one of its citizens is the victim in these tragic circumstances? Perhaps. However, there are some alternatives that Italy could choose to pursue. Because this is a matter of sovereignty, the victim's nation must pursue remedies through political means, rather than judicial means. The victim's state could use a number of political actions to put pressure on the combatant's nation to take more direct action against the combatant, including the entire spectrum from a *de marche* to direct sanctions.[133] The victim's nation could also approach the Security Council and ask them to take cognizance of the occurrence, which would likely have limited success in the present case, or could refer the event to the International Criminal Court if both states are members. The victim's state might then seek extradition, consent to try the combatant and provide required assurances to the combatant's state that the combatant would be treated fairly, or offer to allow the combatant to raise combatant immunity as an affirmative defense. It is even possible that some combatants in SPC Lozano's position would desire the opportunity themselves to resolve the situation.

The victim's state also has other solutions available. The victim's state might seek a financial remuneration, along the lines of a claim or an *ex gratia* payment, for the death of the victim to be paid to the victim's family. There may be no need for an admission of guilt on the part of the combatant's state but merely a financial expression of condolence over the tragic event. Finally, the victim's state might refuse to participate in military operations with the combatant's state without some prior agreement to address similar situations in the future. Such an action might provide sufficient incentive for the combatant's sovereign but would also likely require a reciprocal promise.

Importantly, all of these proposed solutions are political solutions, not judicial solutions. A soldier such as SPC Lozano, who was acting as the agent of his sovereign and was determined by his sovereign to have acted appropriately in the circumstances, ought not to be subject to Italy's domestic criminal process via passive personality jurisdiction nor should he be tried *in absentia*. Neither Judge Gargani, nor any judge acting appropriately under international law, ought to allow such proceedings to occur.

133. Such actions are contemplated in Article 149 of the Geneva Convention for the Protection of Civilian Persons in Time of War,. Geneva Convention Relative to the Treatment of Civilian Persons in Time of War, art. 149, Aug. 12, 1949, T.I.A.S. 3365.